FILE COPY

In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal from the United States District Court
For the Northern District of Ohio,
Eastern Division

JURISDICTIONAL STATEMENT

Jack M. Schulman, Esq.
Schulman & Schulman
720 Standard Building
Cleveland, Ohio 44113
(216) 621-6500

Jonathan H. Rosen, Esq.
Rosen & Rosen
1161 Euclid Avenue
Cleveland, Ohio 44115
(216) [illegible]-2727
Counsel for Appellants

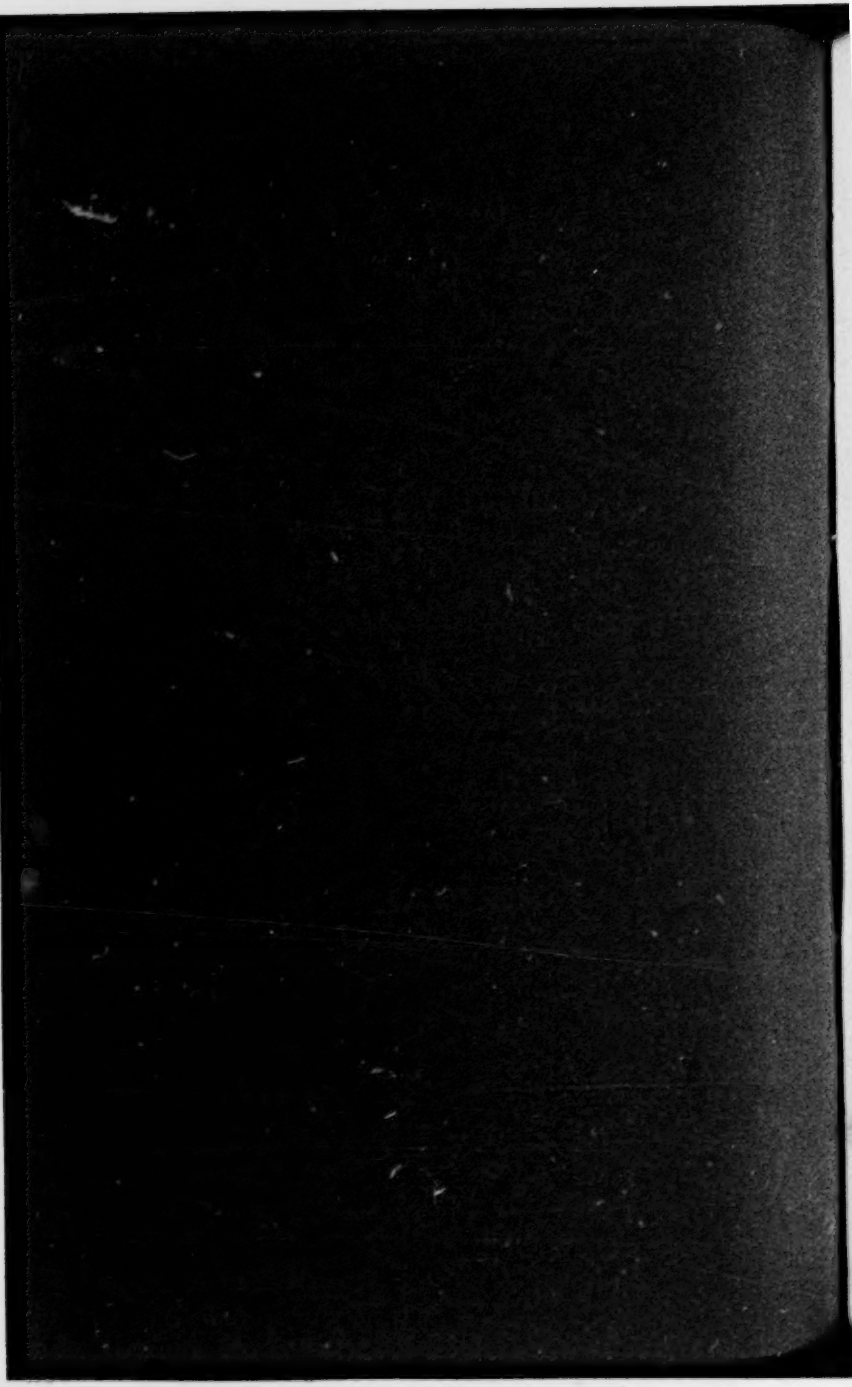


TABLE OF CONTENTS

Opinion Below 2

Grounds Upon Which Jurisdiction of this Supreme Court of the United States is Invoked 2

Date of Judgment Sought to be Reviewed 3

State Constitutional Provision Involved 3

Questions Presented in this Appeal 4

Statement of the Case 5

Conclusion 11

Appendix A. Memorandum Opinion and Order of the District Court 13

Appendix B. Constitution of the State of Ohio, Article IV, Section 6 27

TABLE OF AUTHORITIES

Cases

Argersinger v. Hamlin, 92 S. Ct. 2006 11

Beck v. Ohio (1964), 379 U.S. 89 8

England v. Louisiana State Board, 375 U.S. 411 3

Florida Lime and Avocado Growers Inc. v. Jacobson, Cal., 362 U.S. 73 3

Government Employees v. Windsor, 353 U.S. 364 3

State ex rel. Hawke v. LeBlond (1923), 108 Ohio St. 126 9

State ex rel. Wallace, Judge, Celina Municipal Court, Appellant v. City of Celina, et al., Appellees, 29 Ohio St. 2d 109, 279 N.E.2d 866 ..... 7-8, 9

Welsh v. United States (1970), 398 U.S. 333 10

Constitutions and Statutes

Constitution of the State of Ohio:

Article II, Section 20 ..... 5, 6, 7
Article IV, Section 6(B) 3, 6, 7, 8, 10

Constitution of the United States:

Amendment Fourteen 2, 3, 4, 5, 10
Article III, Section 2 3
Article IV, Section 4 ..... 3, 5

28 U.S.C.A. 1253 2
28 U.S.C.A. 1331 2
28 U.S.C.A. 1343 2
28 U.S.C.A. 2281 2

In the Supreme Court of the United States

October Term, 1972

No. .....

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

ARTHUR DAVIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a three-judge panel in the United States District Court for the Northern District of Ohio, Eastern Division. Said judgment denied declaratory relief to plaintiffs therein and dissolved that court's temporary restraining order and injunction, which had enjoined defendants from disturbing payment of "in-term" compensation increases being paid to plaintiff judges. Also enjoined by the said District Court were actions seeking to recover "in-term" increments previously paid to said judges, which in many instances involve amounts as high as twenty-five thousand dollars per judge.

Appellants believe the District Court below abused its discretion in failing to continue in effect its injunctive relief and in failing to provide permanent relief to appellants from state action which appellants believe to be violative of the Fourteenth Amendment to the Constitution of the United States.

The issues involved herein are of a substantial nature not because of monetary considerations alone, but because they relate directly and implicitly to the fundamental rights of equal justice for *all*, the very cornerstone of this nation's judicial system and government.

OPINION BELOW

The judgment and opinion of the United States District Court aforementioned is unreported at this time; the full text of same is, therefore, incorporated herein as Appendix "A".

Appellants respectfully request this Court to take particular notice of the following numbered paragraphs of the lower court's opinion, to wit: No. 12, 13, 14, 15, 16.

GROUNDS UPON WHICH JURISDICTION OF THIS SUPREME COURT OF THE UNITED STATES IS INVOKED

1. This suit was brought as an original action in the aforementioned United States District Court under Titles 28 U.S.C.A. 1331, 28 U.S.C.A. 1343, and 28 U.S.C.A. 2281. It is brought to this United States Supreme Court under Title 28 U.S.C.A. 1253.

2. Jurisdiction is further supported by this Court's consideration of such cases as *England v. Louisiana State Board,* 375 U.S. 411, *Government Employees v. Windsor,* 353 U.S. 364, and *Florida Lime and Avocado Growers Inc. v. Jacobson,* Cal., 362 U.S. 73.

3. By virtue of Article III, Section 2, of the Constitution of the United States, judicial power extends to all cases in law and equity arising under the Constitution. The claim herein arises under the Fourteenth Amendment to the Constitution of the United States, as well as probable involvement of Article IV, Section 4, of the Constitution of the United States.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

1. Final judgment of the United States District Court, Northern District of Ohio, Eastern Division, was entered on November 22, 1972 at 12:10 p.m.

2. Appellants' notice of appeal, following overruling by said court of a motion for rehearing, was filed with the clerk of said District Court on December 16, 1972 at 12:40 p.m., along with required deposit for costs.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Article IV, Section 6(B) of the Constitution of the State of Ohio, as amended on May 7, 1968. (See Appendix "B".)

QUESTIONS PRESENTED IN THIS APPEAL

1. Whether a United States District Court may abstain from adjudicating plaintiffs' claim of denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, merely by concluding that appropriate relief would result in leveling-off favored members of a class rather than conferring a direct benefit upon the disadvantaged and underincluded plaintiffs of the same general class.

2. Whether a state constitution may, consistent with the Fourteenth Amendment's guaranty of equal protection of the laws, single out municipal court judges from all other judges for denial of in-term increases in compensation, where said differential treatment has no rational basis for distinguishing between the members of the class of judges and where such discrimination is contrary to the purpose and intent of the amended state constitution.

3. Whether a United States District Court, in an original action, may abstain from adjudicating the merits of a claim of arbitrary, invidious classification and rest its judgment upon a state court opinion in a separate and distinct action wherein that state court fails to substantially and materially decide the legitimacy of the classification on the basis that it lacked jurisdiction to do so, but, nevertheless gratuitously predicts that if it had proper jurisdiction, it would find the classification legitimate.

4. Whether a state constitution which treats all judges in the state as a class, but without any reasonable, rational, substantial, or persuasive public interest, discriminates against one segment of the general class with respect to the right to receive increases in compensation

during term of office constitutes a violation of plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States.

5. Whether a state denies to its citizens the fundamental right afforded by Article IV, Section 4, of the Constitution of the United States, when such citizens by their unmistakable, unambiguous declaration in a referendum election directs the state to perform certain acts, which acts would not be inconsistent with either the constitution of the state nor of the Constitution of the United States and which acts the state fails and refuses to perform.

6. Whether a state may promote and adopt a program or scheme designed to improve its judicial system generally, but denies some of its citizens access to all facets of such improved judicial system, particularly those citizens compelled by law to adjudicate their claims or criminal charges in courts of the state which have been excluded from the full impact of the judicial improvement program, without a rational, substantial, or reasonable purpose.

STATEMENT OF THE CASE

1. After 171 years, the electorate of Ohio was persuaded to adopt a comprehensive amendment of Article IV, the judicial article, of its constitution, with the avowed purpose of modernizing and increasing the quality and efficiency of all of its courts of record.

2. One of the more prominent changes advocated was exemption of *judges* from the restrictions imposed by Article II, Section 20, of the constitution of the State of Ohio, which reads as follows:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

3. In the referendum election held on May 7, 1968 the ballot upon which the electorate signified its adoption of the Amendment of Article IV, known popularly as the "Modern Courts Amendment", no distinctions were made as to applicability of exemption from the prohibitions of Article II, Section 20 as to any particular class of judge. The pertinent language read as follows:

"* * * to equalize *judges'* salaries and to allow increases in compensation during term * * *". (Emphasis added.)

The full text of the ballot language will be found in the lower court's memorandum opinion attached hereto.

4. In the drafting of a Joint Resolution of the General Assembly, which was enacted so as to present the constitutional amendment to the electorate, Section 6(B), the "compensation section," fails to mention the title of municipal court judge. In the District Court the testimony of the Honorable William W. Milligan, United States Attorney for the Southern District of Ohio, and the testimony of the Honorable John V. Corrigan, Justice of the Court of Appeals of Cuyahoga County, Ohio, established without contradiction that the absence of the title "municipal court judge" was an oversight and that it was not the intention of the General Assembly to exclude such judges from the benefits of Section 6(B). Mr. Milligan was co-chairman of the Ohio State Bar Association Modern Courts Committee which played the major role in proposing and

promoting the adoption of the constitutional amendment and testified to his thorough knowledge of the events leading up to the action of the General Assembly and the electorate. Justice John V. Corrigan at the time of the proposal to the General Assembly also participated most importantly as Chairman of the Ohio Judicial Conference.

5. Following adoption of the amendment in May, 1968, several general trial courts in the state, several state appellate courts, and an official opinion of the Attorney-General, held that municipal court judges were among the class of judges exempted from the restrictions of the aforementioned Article II, Section 20, and were as a result of the "Modern Courts Amendment" *"cases provided for in the Constitution"* entitled to receive increases in compensation during term of office.

6. Early in 1972, after most of the approximately 170 municipal court judges had received increased compensation by virtue of a new schedule of compensation enacted June 10, 1968, the court of appeals of Mercer County, Ohio, handed down an opinion contrary to the other court of appeals decisions and the issue perforce came before the supreme court of Ohio.

7. The supreme court of Ohio on March 1, 1972, in an opinion written by the Chief Justice of said Court, construed Article IV, Section 6(B) to be applicable in *all respects* to municipal court judges, but *not with respect* to exemption from the change of salary restriction of Article II, Section 20, since the title "municipal court judge" did not appear in Section 6(B).

8. The case in which the supreme court of Ohio rendered its interpretation is known as *The State ex rel. Wallace, Judge, Celina Municipal Court, Appellant v.*

City of Celina, et al., Appellees, 29 Ohio St. 2d 109, 279 N.E.2d 866. Interpretation of Article IV, Section 6(B) was the only issue brought before the state court and its decision, as a matter of law in Ohio, is confined to that single issue by virtue of Ohio's long-standing practice and rule that the syllabi of a decision of the supreme court, unless per curiam, controls the law of the case. This United States Supreme Court has had occasion to be confronted with that Ohio practice in *Beck v. Ohio* (1964), 379 U.S. 89 at page 93, footnote No. 2, which reads:

> "For more than 100 years the rule in Ohio has been that its Supreme Court except for per curiam opinions, speaks as a court only through the syllabi of its cases. * * *."

9. In the course of writing his opinion, however, the Chief Justice alluded to the question of whether the issue of "equal protection" was involved in the case before the court. The language used was as follows:

> "This brings us to relator's argument in relation to equal protection. It does not appear in the record that this argument was raised in the Court of Appeals. Although relator asserts that it was raised in oral argument therein, it is not discussed in the opinion of that court.
>
> "In Toledo v. Reasonover (1965), 5 Ohio St. 2d 22, it was held that this court '* * * will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court.' Paragraph five of the syllabus in Winslow v. Ohio Bus Line Co. (1947), 148 Ohio St. 101, reads, in part: '* * * *this court may not pass upon any question unless the record certified to this court by the Court of Appeals discloses that such*

question was presented to and passed upon by that court.' Thus, the court is not required to pass upon that question.

"In any event, the court is of the opinion that there are sufficient *differences between the courts* enumerated in Section 6(B) and Municipal Courts to authorize their separate classification without abridging the equal protection clause of the Fourteenth Amendment. * * *". (Emphasis added.)

10. The foregoing statement of the Ohio supreme court is not dispositive of the issue of equal protection for the reasons cited by that court itself in addition to the fact that no reference to the issue is contained in the syllabi. It is, if anything, dispositive of the fact that *courts* may be classified, a totally unrelated matter. That "courts" and "judges" are not synonymous is well known to Ohio law as stated in *State ex rel. Hawke v. LeBlond,* (1923) 108 Ohio St. 126 at page 132:

"It cannot be doubted that by these statutes the Ohio Legislature has recognized the distinction between courts and judges * * * * *. The Court is a tribunal organized for the purpose of administering justice, while the judge is the officer who presides over that tribunal.

"The terms 'court' and 'judge' are sometimes used interchangeably and synonymously, but they are never technically the same in meaning." (See also Todd v. United States (1894) 158 U.S. 278, at page 284.)

11. Appellants, with exception of Judge Wallace as a member of the class, were not parties to the aforementioned *Wallace v. Celina* case, and, therefore, brought the

instant action in the United States District Court to achieve determination of the substantial issue of whether Article IV, Section 6(B) is inconsistent with the protections guaranteed under the Fourteenth Amendment to the Constitution of the United States.

12. The United States District Court below, however, avoided the Constitutional issue on the ground that it saw only one means of treating plaintiffs and other judges equally, but such treatment would result in the advantaged class of judges to lose their advantage and afford no monetary benefit to the plaintiffs. No discussion or consideration is indicated in the opinion as to whether the classification is unreasonable, arbitrary, discriminatory or bears a relation to the object and purpose of the legislation, thus leaving the issue in limbo not only to the detriment of the citizens of Ohio, but to those of any other state in the Union contemplating judicial reform programs.

13. The District Court below was in error also, appellants believe, in failing to recognize its power to correct the discriminatory provisions of Article IV, Section 6(B) as indicated by this Court in *Welsh v. United States* (1970), 398 U.S. 333, wherein this Court stated in part:

> "Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."

14. In the United States District Court below not a shred of evidence was introduced to indicate that the discrimination against municipal court judges was based upon

any rational, substantial basis in furtherance of the objects and purposes of the legislation in question.

CONCLUSION

1. The issues and questions of law present in this case are, appellants believe, of a substantial nature having import far beyond the borders of the state of Ohio. Many states have adopted new court and judicial structures; others, New York State for example, are in the process of doing so and the subject of court reform is one of wide public interest and concern throughout these United States.

2. Of particular concern is improvement of courts of limited jurisdiction or first jurisdiction, such as municipal courts. This Court has recently noted its concern in such cases as *Argersinger v. Hamlin*, 92 Supreme Court Reporter 2006, at page 2011, where the Court describing conditions in the lower courts said:

> " 'Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.' "

3. The discriminatory practice complained of in this case is directly and importantly related to helping to cure those "basic ills" referred to by the Court.

4. Appellants acknowledge that there are numerous instances wherein states are permitted to make classifications which for one reason or another do not encompass every evil contemplated in the legislative scope. We do insist, however, that no such logic may be countenanced

with respect to the subject of justice in a nation which proclaims "Liberty and *Justice for All*".

Respectfully submitted,

JACK M SCHULMAN
SCHULMAN & SCHULMAN
730 Standard Building
Cleveland, Ohio 44113

JONATHAN S. ROCKER
REDDY & ROCKER
1101 Euclid Avenue
Cleveland, Ohio 44115
Counsel for Appellants

APPENDIX A

Opinion and Order of District Court

No. C 72-532

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Plaintiffs,

vs.

ARTHUR DAVIS, *et al.*,
Defendants,

and

RICHARD L. DITTO, *et al.*,
New Party Defendants.

MEMORANDUM OPINION AND ORDER

BEFORE: WEICK, *Circuit Judge;* GREEN, *District Judge;* and CONTIE, *District Judge.*

CONTIE, *D.J.*

This cause came on to be heard on the complaint of plaintiffs, the Ohio Municipal Judges Association; and Robert F. Niccum, who is a duly elected municipal judge in the City of Euclid; and the answer of defendants, Arthur Davis, Director of Finance, City of Euclid; George M. Voinovich, Cuyahoga County Auditor; and Joseph T. Fer-

guson, State Auditor; wherein plaintiffs requested the Court to make certain orders relative to Article IV, §6(B) of the Ohio Constitution, and alleges that the same is in conflict with the United States Constitution.

After the commencement of the action, the Court granted leave to the Cuyahoga County Bar Association to become a party plaintiff; and granted leave to Richard L. Ditto, County Auditor of Allen County, to become a party defendant. The Court further permitted Edward Ward, Finance Director of the City of Lima, Ohio, to become a party defendant.

The complaint alleges jurisdiction under Title 28, USC §§1331, 1343, and 2281 and further alleges that the amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest.

The Court made a determination that the within action was a class action in accordance with Rule 23, F.R.Civ.P., the members of the class being all individuals presently serving as municipal judges in the State of Ohio as well as all individuals who are not presently serving as municipal judges in the State of Ohio but who have served as municipal judges at any time between May 2, 1968, and the date of the order. The Court directed that notices be sent to the members of the class by the plaintiffs in accordance with Rule 23, together with notification that members of the class could file requests for exclusion. A request for exclusion was filed by Reed M. Winegardner of Fayette County; Harry Vanberg, Akron Municipal Court; and R. K. Wilson, Piqua Municipal Court.

The prayer of the complaint is as follows:

"A. That a three-judge panel be convened pursuant to Title 28, USCA §2281 to hear and determine the issues in this cause;

B. That the Attorney General of Ohio and the Governor of Ohio be notified of the pendency of this action;

C. That a temporary restraining order be issued by a single judge of this Court, pending a hearing by the three-judge panel; that upon the convening of a three-judge panel a preliminary injunction be issued pending final disposition of this cause; and that upon final hearing of this cause a permanent injunction be issued, all of which injunctions would restrain and enjoin the defendants, their agents, and employees and those in active concert with them from refusing compensation to any municipal judge, except pursuant to §1901.11 O.R.C. (enacted June 10, 1968), and from attempting or endeavoring to secure return of any sums already paid to the plaintiff, Niccum, and the members of the classes which he represents;

D. For a declaration of the rights, status and liability of the parties; for a declaration that Article IV, §6(B) of the Ohio Constitution is in conflict with the Fourteenth Amendment to the United States Constitution and constitutes a denial of equal protection of the law, and due process of law to all municipal judges of the State of Ohio within the classes represented by the plaintiffs; and

E. For such other relief as the Court shall deem just and proper, including costs herein."

The prayer was subsequently amended with leave of the Court to add the following paragraph:

"D(1) That the Court order the defendants to compensate all plaintiffs and all members of the class they represent in accordance with any salary increases

specified or enacted during their respective terms of office, and enjoin the defendants from refusing compensation to the plaintiffs and those members of the class they represent in accordance with any salary increases specified or enacted during their respective terms of office."

Answers were duly filed by the respective defendants. The following stipulations were entered into by and between the parties prior to oral argument:

"1. Defendant Arthur Davis, Finance Director, City of Euclid, Ohio, stipulates that with regard to plaintiff, Robert F. Niccum, the amount in controversy exceeds Ten Thousand and no/100 Dollars ($10,000.00), exclusive of costs and interests.

2. The Ohio Municipal Judges Association is an unincorporated association, duly organized and existing under the laws of the State of Ohio. Its general purpose is to act for the benefit of the municipal judges of the State of Ohio, to represent their joint interests and to promote improvement in the administration of justice in the municipal courts. There are approximately One Hundred Seventy (170) members of the Association, and the Association brings this action on its own behalf and on behalf of its members. .

3. Robert F. Niccum is the duly elected municipal judge in the City of Euclid, Ohio. He was elected to his present term on January 1, 1970, and said term is for a period of six (6) years.

4. The plaintiff, Niccum, brings this action on his own behalf and on behalf of the following classes of individuals.

a) All individuals presently serving as municipal judges in the State of Ohio; and

b) All individuals who are not presently serving as municipal judges in the State of Ohio, but who have served as municipal judges at any time between May 2, 1968, and the present date.

5. Mr. Arthur Davis is the duly appointed and acting Finance Director of the City of Euclid, Ohio. Edward Ward is the duly elected and acting Finance Director of the City of Lima, Ohio. It is their responsibility and duty to pay the various officials and employees of the cities of Euclid and Lima, respectively, including the plaintiffs, Niccum and Andrews, the salaries and compensation to which they are entitled by law. The compensation which the plaintiffs, Niccum and Andrews, receive for the performance of their duties as municipal judge of the City of Euclid and Lima, respectively, is paid in part by funds from the cities of Euclid and Lima, which the defendants, Davis and Ward, are obligated to disburse.

6. The defendant, George M. Voinovich, is the duly appointed and acting County Auditor of Cuyahoga County, Ohio. The defendant, Richard L. Ditto, is the duly elected and acting Auditor of Allen County, Ohio. The compensation which the plaintiffs, Niccum and Andrews, receive for the performance of their duties as municipal judge is paid in part from funds belonging to Cuyahoga and Allen Counties. The defendants, Voinovich and Ditto, have the duty and obligation as County Auditor to pay plaintiffs, Niccum and Andrews, the compensation to which they are entitled by law.

7. The defendant, Joseph T. Ferguson, is the duly elected State Auditor of Ohio. Part of his responsibilities and duties as State Auditor include the supervision of the various cities and counties of Ohio in their financial operation. Among these responsibilities, Mr. Ferguson instructs the various counties and cities as to the legal and proper expenditure of their funds. Among the expenditures which he directs and oversees is the responsibility of the defendant, Davis, and the defendant, Voinovich, to pay the lawful and proper judge's compensation to the plaintiff, Niccum, and to those classes represented by the plaintiffs.

8. On or about May 7, 1968, the State of Ohio by referendum vote adopted Article IV, §6(B) of the Ohio Constitution, which provides in part as follows:

> "The judges of the Supreme Court, Court of Appeals, and of the Courts of Common Pleas shall at stated times receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. . ."

9. On or about June 10, 1968, the Legislature of the State of Ohio enacted §141.04 O.R.C. which provided a new schedule of compensation for judges of the Supreme Court, Courts of Appeals, and Courts of Common Pleas.

10. On or about June 10, 1968, the Legislature also enacted §1901.11 O.R.C., which provided a new and different compensation schedule for municipal judges.

11. Article II, §20 of the Ohio Constitution provides:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

12. As so construed, the Ohio Constitution creates a distinction between judges of the Supreme Court, the Courts of Appeals, and the Common Pleas Courts on the one hand, and municipal judges and county judges on the other hand. As construed by the Ohio Supreme Court, the Ohio Constitution allows for increases of salary during term for Supreme Court, Courts of Appeals, and Common Pleas judges but prohibits increases in salary during the term to municipal judges and county judges.

13. Some Municipal Courts have county-wide jurisdiction, the same as all Common Pleas Courts.

14. Municipal Courts have concurrent jurisdiction with Common Pleas Courts in some cases.

15(a) The following provisions of Article IV, §6, Ohio Constitution, apply to *all* judges in the State of Ohio, including *Municipal Court judges*.

1. Terms of office begin on days fixed by law; applicable to *all* judges. Terms of office are all six years.

2. Times and mode of election of *all* judges are set according to laws enacted therefor.

3. *All* judges are prohibited from receiving any fees or perquisites.

4. *All* judges are prohibited from holding any other office of profit or trust, under the authority of the State or the United States.

5. All votes for *any* judge, for *any* office, except for a judicial office are void.

6. *All* judges are barred from election if they attain the age of 70 years before the date on which they take office.

7. *All* judges who retire voluntarily or because of restriction against re-election are eligible for assignment to active duty.

8. *All* judges who accept assignments after retirement are paid on a per diem basis; no restriction as to increase in rate of compensation to any such assigned judge.

9. *All* judges who serve by assignment after retirement receive the per diem compensation in addition to any retirement benefits received.

16. The amendment to Article IV, Ohio Constitution, appeared on the ballot as follows:

'PROPOSED CONSTITUTIONAL AMENDMENT
ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)

A majority affirmative vote is necessary for passage.

Shall the Constitution of the State of Ohio be amended by Amending Sections 1 and 2, Enacting Sections 3, 4, 5, and 6, and Repealing Existing Sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV and by Repealing Sections 12 and 13 of Article II as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise

administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, *to equalize judges' salaries and to allow increases in compensation during term,* to remove the Probate Court, as a Constitutional Court and to authorize the consolidation of County Probate Courts and Courts of Common Pleas?" (Emphasis supplied.)

17. The defendant, Joseph T. Ferguson, has instructed all county and municipal fiscal officers to discontinue payment of the compensation specified in §1901.11 O.R.C. to municipal judges who were elected to office prior to June 10, 1968, and to municipal judges whose salaries have been increased during their term of office. Unless restrained by this Court, the defendants, Davis, Ward, Ditto, and Voinovich, together with all other fiscal officers of the counties and municipalities in the State of Ohio will refuse compensation to the plaintiffs, Niccum and Andrews, and to the classes represented by the plaintiffs as those rates of compensation are specified in §1901.11 O.R.C. Further, the defendants will seek to recover sums paid to the plaintiffs, Niccum and Andrews, which are in excess of the salary schedule specified in the predecessor to §1901.11 O.R.C.

18. Prior to the adoption of Article IV, §6(B) of the Ohio Constitution on May 7, 1968, all judges were prohibited from receiving in term salary increases."

Article IV, §6(B) has been subject to review by the Ohio Supreme Court in *Ex rel Wallace, Judge, Celina Municipal Court v. City of Celina*, 29 Ohio St. 2d 109 (1972). Therein, the Ohio Supreme Court construed

Article IV, §6(B) as not including municipal judges within its scope, and denied plaintiff a writ directing the respondent City Council to make an appropriation for additional salary. Syllabus two of the *Wallace* decision reads:

> "The language of Section 6(B) of Article IV of the Ohio Constitution relating to the compensation of judges for their services as judges of the Supreme Court, Courts of Appeals and Courts of Common Pleas is explicit. That language does not include, nor does it apply to, Municipal Court judges."

Plaintiffs contend that the Ohio Supreme Court did not consider the equal protection issue raised in this action. This Court has thoroughly read the *Wallace* decision, and cannot agree with that contention. The Ohio Supreme Court specifically addressed itself to the equal protection clause as follows:

> This brings us to relator's argument in relation to equal protection. It does not appear in the record that this argument was raised in the Court of Appeals. Although relator asserts that it was raised in oral argument therein, it is not discussed in the opinion of that court.
>
> • • • • •
>
> In any event, the court is of the opinion that there are sufficient differences between the courts enumerated in Section 6(B) and Municipal Courts to authorize their separate classification without abridging the equal protection clause of the Fourteenth Amendment. *Id*, at p. 113

This Court, in determining the issues before it is bound to apply the construction applied to Article IV, §6

(B) by the Ohio Supreme Court. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1941); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940).

It is well settled that in an action presenting a constitutional attack on state laws the federal courts should abstain from reaching the constitutional issues if there are alternative grounds for decision. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 269 (1969); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Tower Realty v. City of East Detroit*, 196 F. 2d 710 (CA 6, 1952). One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. *Government and Civil Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364 (1957).

In this action the primary relief sought by plaintiffs is an order that municipal judges be compensated in a manner which would recognize in-term salary increases previously granted to them. In order to achieve that end plaintiffs attack Article IV, §6(B) as denying them equal protection under the laws.

The difficulty with plaintiffs' position is that Article IV, §6(B) created a limited exemption from the operation of Article II, §20 of the Ohio Constitution. If that exemption was found to violate the Fourteenth Amendment to the United States Constitution, this Court would be unable to grant to plaintiffs the right to in-term salary increases. A holding invalidating Article IV, §6(B) would result in all Ohio judges being subject to Article II, §20 rather than municipal judges being included in Article IV, §6(B).

This inability to grant to plaintiffs the primary relief sought, even if they should be correct on their con-

stitutional claim, requires dismissal of the complaint without the necessity of deciding the constitutional issue. Plaintiffs' argument that relief could be afforded to them by construing Article IV, §6(B) as including municipal judges is concluded by the controlling contrary construction of that provision by the Ohio Supreme Court.

This Court is in sympathy with all Ohio municipal judges who were excluded by the enactment of Article IV, §6(B) of the Ohio Constitution. However, as stated above, the language of the amendment is clear and unequivocal; and this Court has no authority to add to said Article. This Court finds that the actions of Joseph T. Ferguson, wherein he directed that Municipal Court judges be barred from any increases during their term, were proper and within the authority of Article II, §20 of the Ohio Constitution.

The temporary restraining order heretofore issued by this Court is hereby dissolved, and this case is dismissed. Costs assessed to plaintiffs.

IT IS SO ORDERED.

/s/ PAUL C. WEICK
U. S. Circuit Judge

/s/ BEN C. GREEN
U. S. District Judge

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

GREEN, *J.*, Concurring:

There were certain matters argued by plaintiffs in the course of these proceedings which I believe warrant some consideration.

Plaintiffs presented a number of affidavits from members of the legislature and from persons who were active in the promotion of the constitutional amendment indicating that it was the intention of the legislature, at the time of submission of this amendment to the voters, to include all judges within its scope. Plaintiffs point out that the wording of the issue upon the Ohio ballots was such that the voters could reasonably interpret the proposal before them as allowing in-term increases to all judges in the state.

Based upon those factors, plaintiffs argued that this Court should construe Article IV, §6(B) so as to effectuate the legislative intent and bring municipal judges within its protection. Unfortunately, under the controlling law as set forth in the principal opinion, this Court cannot do so, even though it may be possible that the amendment in the form in which it appeared on the ballots was misleading to the voters of Ohio and inconsistent with the understanding of many members of the legislature. It appears that under these circumstances, the only avenue open to remedy the failure of the constitutional amendment to reflect the legislative intent lies with the legislature itself.

There is, in my opinion, another problem presented in this litigation.

On the same date (subsequent to the enactment of Article IV, §6(B)) that the legislature enacted a new compensation schedule for judges of the Supreme Court, Courts of Appeals and Courts of Common Pleas, the legislature also enacted a revised compensation schedule for municipal judges. Thereafter, a decision was rendered by the Common Pleas Court of Franklin County, *Young v. Price*, Case No. 263,620, August 5, 1969, holding that

municipal judges were entitled to in-term increases in accordance with the new schedule. On April 17, 1970, the Attorney General of Ohio rendered an opinion, No. 70-046, that municipal judges could receive in-term increases. Based upon those authorities, many municipalities granted increases to judges serving upon the municipal bench. The Ohio Supreme Court's decision in *Wallace v. City of Celina*, 29 Ohio St. 2d 109 (1972), was the first authority holding that municipal judges could not receive the same benefit conferred upon other judges in the State of Ohio.

It was represented by plaintiffs that, if relief was denied them, not only would their salaries be reduced from the present levels, but that steps would also be taken to recover alleged excess payments previously made. In some instances this could be a substantial amount, working a hardship on the judge concerned. I believe that the Court's ruling in this case, being restricted to the legal issues discussed in the principal opinion and in this concurrence, has no bearing on the question of the plaintiffs' liability to repay monies previously paid to them. That issue was not before this Court. There may be substantial considerations relevant to this question in addition to the constitutional issue posed and passed upon in this forum.

/s/ BEN C. GREEN

United States District Judge

APPENDIX B

Constitution of the State of Ohio, Art. IV, 6

6. Election of justices and judges; compensation; assignment of retired judge to active duty.

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside during his term of office in the county in which his court is located.

(4) Terms of office of *all* judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election. (Emphasis added.)

(B) The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void. (Emphasis added)

(C) No person shall be elected or appointed to *any judicial* office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. *Any* voluntarily retired judge, or *any* judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for *judges*. (Enacted by 132 v HR 42, eff. 5-7-68) (Emphasis added.)